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Dear Human Resource Professionals, Managers and Employees:

In the course of conducting an investigation of suspected wrongdoing at the workplace, we must often interview our employees. Because we are representatives of a government in conducting such an interview, constitutional rights against self - incrimination and the right to an attorney are implicated. This newsletter will discuss each of those rights in the context of an investigation. Legal citations are not included in the body of the newsletter, but are collected at the bottom of the newsletter. Before beginning the discussion, let me say that these issues may never come up for you in a workplace investigation. If they do, however, I want you to understand them and to be able to deal with them.

FIFTH AMENDMENT RIGHTS

Both the Fifth Amendment to the United States Constitution and our State Constitution give citizens the right to not "be compelled in any criminal case to be a witness against himself…" This is the privilege against self-incrimination.

The courts have recognized that a government employer may insist upon answers from their employees regarding workplace activities and workplace efficiency, and if the employee refuses to answer the question, the employer is entitled to treat the employee as insubordinate. The courts also recognize that in giving the answers the employee may "self-incriminate" regarding a crime. That is, the courts in effect recognize that we have the right to insist that our employees potentially incriminate themselves in a crime by answering questions relative to the workplace.

Happily, the courts have reached a balance on these issues. In general terms which are discussed more specifically below, a government employer can insist on answers to all questions relating to workplace performance under threat of termination for insubordination if not answered, and, consequently, because of such threat those answers cannot be used in a criminal proceeding. This certainly does not prevent their use in a civil proceeding, but the bar against the use in a criminal proceeding protects the employee's right against self-incrimination.

There is a good strong line of cases supporting the above general principles and concepts, but there are two from the United States Fifth Circuit which provide good

examples of their practical application. The first case involves two employees who were asked to take a polygraph examination in the course of an investigation to try to determine who had called in a bomb scare to their public employer. They asserted Fifth Amendment rights and were fired when they refused to sit for the polygraph examination. The two employees attacked such terminations asserting they were being punished for exercising their constitutional right against self-incrimination. They also asserted that their government employer was required to actually affirmatively tender them immunity from criminal prosecution once they asserted such Fifth Amendment rights.

The Fifth Circuit stated:

> "Public employees may, however, be required to answer even potentially incriminating questions if they have not been required to surrender their constitutional immunity. Refusal to answer questions where there has been no request to surrender protected rights is a ground for dismissal."

That certainly is clear and it is based on the decisions of the United States Supreme Court. The Fifth Circuit went on to recognize that those Supreme Court decisions hold that where the employee is compelled to answer under the threat of termination the answers cannot be used in a criminal proceeding because such use would be in violation of the employee's right against compelled self-incrimination as guaranteed by the Fifth Amendment. As mentioned above, however, these employees were arguing that the government employer had an affirmative duty to tender to them immunity from further criminal prosecution, but the Fifth Circuit disagreed finding that such affirmative tender of immunity was not required by the Supreme Court cases because "it is the very fact that the testimony was compelled which prevents its use in subsequent proceedings, not any affirmative tender of immunity."

One more aspect of this case that is of some interest is the fact that these two employees were asked to sign a series of waivers presented to them by their employer and the polygrapher. The polygrapher's waiver was the boldest and provided in part that, "I voluntarily consent to this examination of my own free will, and state that no duress, threats, or coercion have been placed on me to take this examination." These employees refused to sign and argued that this was a request that they waive their Fifth Amendment right against self-incrimination. The court, however, concluded otherwise. There is quite a long line of cases which requires that a waiver of constitutional rights be very clear and explicit regarding the waiver of those rights. The waiver of such a right cannot be implied from general language such as quoted above and every presumption against such a waiver must be honored. Waivers like this are required by statute in Louisiana to be obtained by the polygrapher, but, again, they do not constitute a waiver of constitutional rights.

In the next case the same principles were articulated, but a little twist to the case which altered the outcome was that the employer was a law enforcement officer, i.e. a constable with the power of arrest. Like the case above, the constable insisted on answers to his questions relating to suspected workplace misconduct, but unlike the employer above, this constable told his employees that the answers they gave were going to be used to prosecute them. They were fired, but the Fifth Circuit concluded that by telling the employees that their answers were going to be used against them in a criminal proceeding, and insisting upon the answers, the constable was demanding that the employees waive their Fifth Amendment rights against self-incrimination. The court concluded that this employer went too far.

In the normal circumstances of a workplace investigation, we should not do what the constable did. Our primary concern is workplace efficiency. If these issues come up in the course of an investigation, we want to make it clear to our employees from whom we are seeking answers that they are guilty of insubordination which may support termination if they don't answer, and, also, that we are not asking that they waive their Fifth Amendment rights against self-incrimination. This concept is demonstrated in this next case, which is a state case.

This state case also involved a police employer possessing the general power of arrest. It involved the Louisiana State Police. A state trooper was suspected of wrongdoing and was investigated by the Internal Affairs section of the Louisiana State Police. At the time of his interview this trooper was given the following warning:

> "This is an administrative investigation made only for internal department purposes. Your statements cannot be used against you in any criminal investigation or proceeding nor can evidence derived from your statements. As a direct representative of the appointing authority, I hereby order you to answer all questions, truthfully, completely, and unevasively. You should understand that by refusing to obey this order you can be disciplined for insubordination, and the punishment for insubordination can be up to and including termination of employment. You are ordered not to disclose or discuss the contents of this interview or investigation with anyone without first obtaining written permission from the appointing authority."

That warning pretty well summarizes what we have discussed above and you may want to use it yourself. Once the Internal Affairs Division completed its investigation certain civil action was taken against this state trooper and, also, the trooper's statements were given to the Attorney General, who pursued a criminal investigation resulting in an indictment. The indictment was gained by using the statements given in the administrative proceeding. Well, we all now know what the court held. The court recognized that those statements were compelled because of the threat of termination,

and, because they were compelled, they could not be used against the trooper in a criminal proceeding.

In giving the trooper's statements to the Attorney General for criminal prosecution, the Internal Affairs Division of the Louisiana State Police did exactly what they should have done. Where we as public servants become aware of possible criminal violations occurring in the workplace, I do not believe we can defend not telling the criminal prosecution arm of the government about the information we have. Our first step, and our obligation, is to maintain an efficient and effective workplace environment for the delivery of public service through the investigation of suspected workplace misconduct. Where we uncover facts in the course of our investigation that may support a conclusion of a criminal violation, it is incumbent upon us to take appropriate civil action by termination or otherwise, and, also, to forward our investigation to the prosecutorial arm of the government.

One more thing, however. The public demands workplace efficiency. There may be occasions, however, where criminal conduct is expected to exist to such a degree that the public's interest in being free from criminal behavior outweighs their interest in an effective and efficient workplace. That is, there may be occasions when we want to involve outside law enforcement at the outset, or if we are police officers ourselves, to pursue the matter as a criminal investigation with the appropriate safeguards rather than as an internal workplace investigation. This is left to your sound judgment in consultation with your attorneys.

RIGHT TO AN ATTORNEY

The Sixth Amendment of the United States Constitution and Article I, Section 13 of the State Constitution give a person a right to an attorney, but only in a criminal prosecution. Criminal prosecutions begin when a prosecutorial authority initiates charges. We, of course, are not prosecutors, and while some of us have the power of arrest which we exercise from time to time, a "criminal prosecution" does not begin with an arrest. Neither the State nor the Federal Constitution directly give any of our employees the right to an attorney before a "criminal prosecution" is begun.

The United States Supreme Court has, however, found that under certain circumstances a person be told that they have the right to an attorney, and the right not to incriminate themselves, before further questioning may take place. This is the "Miranda warning" and the circumstances under which it must be given, and where the rights covered in the warning may be exercised, bear a little discussion.

These Miranda warnings must be given when there is a "custodial interrogation" of a person. The Supreme Court has stated that "by custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Further,

"in custody relates primarily to situations where there is a formal arrest or restraint of movement of the degree associated with a formal arrest." Additionally, the Supreme Court recognizes that a police officer's suspicions about the person being interrogated are irrelevant, and only whether a reasonable person would believe that he is "in custody" as if he were under arrest is a "custodial interrogation" present. Where there is a "custodial interrogation" the right to an attorney and the right against self-incrimination may be exercised and the person must be told of these rights.

It is my view that when we are questioning a subordinate employee about a matter that relates to workplace performance or efficiency, we need not give Miranda warnings, whether we are police officers or not. The reason is twofold.

Before discussing these two reasons, we ought to be mindful of the goal of a workplace investigation. Unless we are at the end of our investigation and sure of our facts, and only wanting to hear from the guilty employee, the goal of our workplace investigation is to gather facts. That is, we want the employees we are interviewing to freely tell us all that they know. Where an employee in such an investigation refuses to answer and asserts a perceived right to an attorney and/or a perceived right against self-incrimination, we could terminate them for insubordination if we wanted to, but we would be left without the answers we are seeking. Circumstances are going to vary with every investigation, but it certainly seems to me that the better course where the employee raises these issues is to explain to the employee the law we are discussing herein and to give the employee a few days to seek the advice of counsel if they want to. Hopefully, by either of those courses, the employee will be persuaded their position is an incorrect position and give us the answers we need and want. If not, then that last resort of termination for insubordination would be appropriate. Please read again my newsletter of December 14, 1998 regarding the polygraph testing of employees which presents analogous issues. Now let's get back to my two reasons for believing we need not give Miranda warnings in the course of a workplace investigation.

The first reason is that the courts interpret "in custody" in a restrictive manner. That is, in a workplace investigation we neither arrest nor restrain as if arrested. Consequently, no "custodial interrogation" exists in a workplace investigation such that no right to an attorney is triggered.

The second reason I do not belief we must give Miranda warnings is that the Supreme Court recognizes that these Miranda warnings, themselves, are not rights protected by the Constitution, but only are measures to ensure that a person's constitutional rights are protected. As we know from reading above, the courts have struck a happy balance between our need to pursue matters relating to workplace efficiency and conduct and the right of an employee to be free from self-incrimination. That is, as mentioned above, when we compel one of our employees to answer questions under threat of termination, what they tell us cannot be used in a criminal proceeding against them. It is this happy balance that protects our employee's right against self-incrimination.

For the attorneys, the citations are as follows: Gulden vs. McCorkle, 680 F. 2d 1070 (5th Cir. 1982); Arrington vs. County of Dallas, 970 F. 2d 1441 (5th Cir., 1992); State vs. Delcambre, 710 So.2d 846 (La. App. 3rd Cir., 1998); Stansbury vs. California, 114 S. Ct. 1526 (1994); Moran vs. Burbine, 106 S. Ct. 1135 (1986); Beckwith vs. United States, 96 S. Ct. 1612 (1976); State vs. Saltzman, 871 So.2d 1087 (La. 2004); State vs. Saltzman, 843 So.2d 1206 (La. App. 3rd Cir., 2003); State vs. Maise, 805 So.2d 1141 (La. 2002); Michigan vs. Jackson, 106 S. Ct. 1404 (1986); and the numerous cases cited within these cases. Also, there is a very comprehensive presentation of this subject at 31 A.L.R. 3rd 565.

Sincerely,

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General Counsel